



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 24, 1996

Mr. Howard D. Bye
Matthews & Branscomb
Legal Counsel for the
San Antonio Zoological Society
106 S. St. Mary's Street
San Antonio, Texas 77251-1562

OR96-1743

Dear Mr. Bye:

You have asked this office to determine if information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The San Antonio Zoological Society (the "zoo"), which you represent, received several related written requests for information from two requestors, concerning information which you claim is the subject of anticipated litigation. We assigned your request ID# 100773.

The society received requests for information relating to the termination of employment of an individual, who has "filed a charge of discrimination with the Texas Commission on Human Rights [TCHR] and the Equal Employment Opportunity Commission [EEOC]." You state that you have released much of the requested information.¹ You have submitted copies of the requestors' letters, copies of the EEOC documents evidencing the pending discrimination charge and a representative sample of the available requested records for our review.² In your original letter to this office, you asserted that the information sought in the first three open records requests was excepted from disclosure under sections 552.102 and 552.103 of the Government Code. However,

¹In this letter, we will address only those documents which you claim are excepted from public disclosure.

²In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

in response to additional open records requests, received later in time, you assert that sections 552.101, 552.102, 552.103 and 552.108 apply to the requested records. We have considered the exceptions you claimed and have reviewed the documents at issue.

You assert that much of the information submitted is excepted from required public disclosure under section 552.103 of the Government Code, based on the filed "Charge of Discrimination." Section 552.103(a), the "litigation exception," excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and,

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The zoo has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. In order to show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated, and that (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The zoo must meet both prongs of this test for the information to be excepted under section 552.103(a). You have submitted a copy of the EEOC complaint filed by the requestor in which she alleges race discrimination against the zoo. A pending complaint before the EEOC indicates a substantial likelihood of litigation. Open Records Decision No. 336 (1982) at 1. Accordingly, you have satisfied the first prong by demonstrating that the zoo is a party to the anticipated litigation. You must also show how the requested information relates to the anticipated litigation.

In order to secure the protection of the "litigation exception," the second prong of section 552.103(a) requires that a governmental body demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision Nos. 588 (1991), 551 (1990). You assert that section 552.103 applies, because the information sought by the requestors relates to the anticipated litigation in which the zoo is a party, as evidenced by the EEOC documents. Although you do not specifically assert how the records submitted for our review relate to anticipated litigation, the complaint and related attachments indicate on their face the required relationship. In this instance, you have made the requisite showing that much of the requested information relates to anticipated litigation for purposes of section 552.103(a); therefore, you may withhold most of the submitted information from the requestors under section 552.103(a). However, we note that with regards to the submitted monthly reports we see no justification for withholding the whole document. Therefore,

you may only withhold the last two sub-headings, since these two sections appear to relate to litigation.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Since it appears that the opposing party in the litigation has seen or had access to much of the information in her personnel records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Finally, the applicability of section 552.103(a) generally ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).³

Since you did not make an assertion that section 552.103 was applicable to the "security logs," we must address whether they are excepted from disclosure under one of the other exceptions you claim. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2 (relevant question is whether release will undermine law enforcement or prosecution); Open Records Decision No. 287 (1981) at 1-2.

The security logs, which you have submitted to our office, are prepared by the security staff of the zoo.⁴ You maintain that disclosure of this information would reveal risks to the physical security of zoo, the employees of the zoo, and the general public, and identify opportunities for theft within the zoo. You also state that "[t]he Zoo's security log books record all breaches of security and thus provide valuable information for anyone interested in burglarizing the Zoo."

We have examined the security logs and agree that the information may be withheld under section 552.108 of the Government Code. Previous decisions issued by

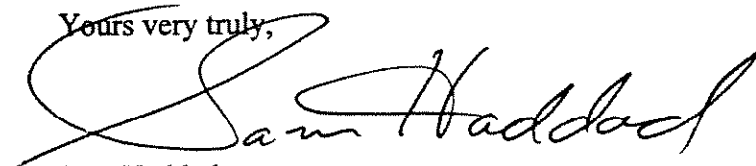
³However, information deemed confidential by law may not be waived and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987). For your convenience, we have included a sampling of common types of information deemed confidential. We caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. See Gov't Code § 552.352 (providing penalties for improper release of confidential information).

⁴It should be noted that a commissioned peace officer is "on-duty" at all times with regard to his obligation to prevent any breach of the peace that he observes in his jurisdiction. Attorney General Opinion JM-140.

this office have addressed the applicability of section 552.108 to law enforcement records reflecting the assignment of law enforcement personnel. Information related to crime prevention, including security measures for specific premises, may be protected by section 552.108. *See* Open Records Decision Nos. 456 (1987) (law enforcement exception protects information about employment of off-duty police officers by private businesses); 413 (1984) (sketch of security measures of prison facilities during next scheduled execution protected by law enforcement exception); *see also* Open Records Decisions Nos. 143 (1976); 22A (1974) (information revealing specialized equipment directly related to investigation or detection of crime excepted by law enforcement exception).

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁵ This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/cbh

Ref.: ID# 100773

Enclosures: Submitted documents
List of Confidential Information

cc: Ms. Alma Hernandez
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(w/ List of Confidential Information)

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⁵Because we find that you may withhold the submitted information under sections 552.103 and 552.108, we do not determine whether specific information may be withheld under sections 552.101 and 552.102 of the Government Code.